In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

ALASKA PACKERS ASSOCIATION (a corporation),
Petitioner,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and FRANK WEIDEMANN.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

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No.....

Alaska Packers Association (a corporation),
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vs.

Warren H. Pillsbury, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Frank Weidemann.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alaska Packers Association, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review

(1) The order of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, entered July 1, 1935, denying a motion to dismiss the separate appeals prosecuted to that court by respondents, and

(2) The final decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on September 22, 1936, reversing the decree of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The District Court rendered no opinion. Its findings of fact and conclusions of law are at R. 204-208. The opinion of the Circuit Court of Appeals on the motion to dismiss (R. 260) is reported in 78 F. (2d) 587. The opinion of the Circuit Court of Appeals on final decree (R. 271) is reported in 85 F. (2d) 758.

SUMMARY STATEMENT OF THE PROCEEDINGS BELOW.

Petitioner instituted this proceeding in the United States District Court for the Northern District of California, Southern Division, to suspend and set aside an order, dated September 16, 1931, entered by respondent Pillsbury as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, fixing and awarding compensation for permanent disability of respondent Weidemann (R. 155-157), and to suspend and set aside a further order by respondent Pillsbury, dated

October 16, 1931 (R. 206-207, 183-184), denying a petition, filed by petitioner, to set aside the order and award of September 16th.[1] The District Court filed findings and conclusions favorable to petitioner (R. 204-208), and entered its decree in accordance with the prayer of the petition. Both respondents filed "notices of appeal", but no petition for an appeal was made to, and no appeal was allowed by, the district judge or any judge or court authorized to allow appeals. The Circuit Court of Appeals denied a motion to dismiss the appeals (R. 269); and thereafter, by a divided court, reversed the decree of the District Court (R. 286).

JURISDICTION.

The order of the Circuit Court of Appeals denying the motion to dismiss was entered July 1, 1935, but final decree was not entered until September 22, 1936. The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The jurisdiction of this Court to review, on certiorari from the final decree, the decision of July 1, 1935, is clear. The question involved in that decision relates to the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court, and is, therefore, necessarily presented and open to the consideration of this Court.

Mansfield, C. & L. M. Railway Co. v. Swan, 111 U.S. 379, 382;

Stratton v. St. Louis S. W. Ry., 282 U.S. 10, 13.

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1. A suit in equity was also brought to set aside the award on the ground of fraud in its procurement. That suit and this proceeding in admiralty to set aside the award were tried by stipulation upon the same record. The District Court dismissed the equity suit (R. 166), on the ground that, while there was a mutual mistake of fact, there was no showing of fraud. No appeal was taken from the order dismissing the suit in equity and that case is not before this Court.

When it appears, on appeal from or certiorari to a Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action for this Court is to reverse or vacate the decree of the Circuit Court of Appeals and remand the case with directions to dismiss the appeal to that court for want of jurisdiction.

Stratton v. St. Louis S. W. Ry., 282 U.S. 10, 18;
United States v. Fidelity & Deposit Co., 295 U.S. 719.

It was in deference to the admonitions of this Court that petitioner prosecuted the suit to final decree before seeking review of the interlocutory order denying the motion to dismiss.

Panama Railroad v. Napier Shipping Co., 66 U.S. 280, 284;
Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 91;
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 254, 257-258.

QUESTIONS PRESENTED.

(1) Did the Circuit Court of Appeals have jurisdiction to entertain the appeals from the District Court in the absence of application for and allowance of such appeals?

(2) Where an award of compensation for temporary disability is made under the Longshoremen's and Harbor Workers' Compensation Act and the employer fails to seek a judicial review of the jurisdictional question of employment within thirty days after such award, is the em-

ployer foreclosed from contesting a second award of compensation for permanent disability on the ground that the employer-employee relationship did not exist at the time of the injury?

(3) Is an order of the Deputy Commissioner denying the employer's motion to set aside an award on the ground that the employer-employee relationship did not exist, a reviewable order under section 21(b) of the Act?

STATUTES INVOLVED.

(a) With respect to the first question:

Section 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940; U.S.C., Title 28, §230):

> "(c) No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

(b) With respect to the second and third questions:

Sections 21 and 22 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1436, 1437; U.S.C., Title 33, §§921, 922):

> "Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in

part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *.

Sec. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

On May 26, 1934, section 22 was amended to read as follows (48 Stat. 807; U.S.C., Title 33, §922):

"Sec. 22. Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the

date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the commission."

SUMMARY STATEMENT OF THE CASE.

On and prior to November 15, 1929, respondent Weidemann was regularly employed as shipkeeper of a schooner belonging to Arthur E. Small lying abreast petitioner's schooner, the "Metha Nelson", in petitioner's shipyard at Alameda, California (R. 97, 131-134). While so employed, his duties permitted him to perform odd jobs for others than his employer, and, during the few months preceding November 15, 1929, petitioner had employed him on several occasions to do various odd jobs (R. 106). On November 15, 1929, petitioner authorized its employee Ernest Califro to ascertain the cubic capacity of the "Metha Nelson", and directed Califro, if necessary, to procure the assistance of Captain Klotz or Captain Weidemann (R. 39, 41). On the morning of November 15th, Califro could not find Weidemann, so he procured the services of Captain Klotz and proceeded to measure the capacity of the schooner (R. 41, 45-46). In the meantime, Captain Weidemann had been told that petitioner's agent had been hunting for him (R. 80, 98). Accordingly, while Califro and Captain Klotz were working in the hold of the vessel,

Captain Weidemann came aboard and attempted to descend into the hold (R. 46-47). In doing so he fell from the ladder and suffered the injuries to his hand for which he was awarded compensation. *At the time of this injury Weidemann was not in petitioner's employ.* The District Court expressly so found (R. 205); and this finding was accepted by the Circuit Court of Appeals. (See also the statement by Judge Wilbur in the dissenting opinion [R. 280-281].)

Weidemann was sent to a hospital and furnished medical treatment (R. 65). Almost immediately after the accident Califro left petitioner's employment and was not heard of again for nearly two years (R. 49-52, 55-57). Petitioner, in Califro's absence, believed that Captain Weidemann had been employed to assist in measuring the "Metha Nelson", and accordingly it cooperated with him and with the Deputy Commissioner in procuring a compensation award. Acting in good faith under the mistake of fact, petitioner notified the Deputy Commissioner of the accident (R. 109), prepared for Weidemann his claim for compensation (R. 114), and requested the Deputy Commissioner to make an appropriate order (R. 128). The matter was set for hearing, but petitioner was not represented at the hearing, it previously having written to the Deputy Commissioner that it desired him to pass "on the responsibility of this particular case" (R. 210). The Deputy Commissioner took the testimony of three witnesses[2], and at the conclusion of the hearing found that at the time of the injury Weidemann was in the employ of pe-

2. The transcript of this testimony is appended to the findings of fact of the District Court (R. 209-230). See finding II (R. 205).

titioner (R. 131).[3] An award of $264.28 and $25 a week during temporary disability was entered on February 1, 1930 (R. 134). This award was promptly paid and Weidemann was employed by petitioner at a wage admitting of no loss of earnings, thus arresting the continuing weekly award (R. 206).

On August 28, 1931, eighteen months after the original award, the Deputy Commissioner reopened the case and held a further hearing on the question of disability (R. 181-182). On September 16, 1931, a second order, awarding $2,541 for permanent disability, was entered (R. 155-157). Shortly after the entry of this order, petitioner for the first time learned from Califro that he had not employed Weidemann on the day of the accident (R. 49-52, 55-57); and promptly thereafter, on October 13, 1931, and within thirty days of the entry of the second compensation order, petitioner filed with the Deputy Commissioner a petition to reopen the case and to set aside the second order (R. 206-207, 183). On October 16, 1931, the Deputy Commissioner denied the petition to set aside or vacate the award (R. 206-207, 183). On November 16, 1931, the present proceeding to set aside and enjoin the orders of September 16th and October 16th was filed in the United States District Court.[4]

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3. The District Court found that the evidence upon which this finding was made was insufficient; that the Deputy Commissioner, with the exercise of reasonable care, should have known prior to the entry of the compensation order and award that Weidemann was not an employee of petitioner, and that the injury was not within the purview of the Longshoremen's and Harbor Workers' Compensation Act (R. 205).

4. The thirtieth day from the date of the order of the Deputy Commissioner of October 16, 1931, fell on Sunday, November 15, 1931. This proceeding was filed the following day. In the court below the question was raised and briefed as to whether section 21a of the Act (supra, p. 5) should be construed to permit the institution of a proceeding to

Upon a trial *de novo* of the question of the jurisdictional fact of employment (*Crowell v. Benson*, 285 U.S. 22), the District Court found that at the time of the injury respondent Weidemann was not an employee of petitioner, and that respondent Pillsbury, with the exercise of reasonable care, should have known this fact prior to the entry of the compensation order and award of February 1, 1930 (R. 205). That court also found that petitioner properly petitioned respondent Pillsbury for an order suspending his order and award of September 16, 1931, made an adequate showing thereon, and that respondent Pillsbury's order denying that petition on October 16, 1931, was an abuse of administrative and judicial discretion reviewable by the District Court under section 21 of the Longshoremen's and Harbor Workers' Compensation Act. Accordingly, the court held that petitioner was entitled to a permanent injunction against the enforcement of the compensation order of September 16, 1931 (R. 208), and decreed accordingly (R. 231).

The final decree of the District Court was entered December 27, 1934. On March 22 and 26, 1935, respectively, respondents filed notices of appeal with the clerk of the District Court (R. 233, 235); and on March 25, 1935, the district judge, in connection with respondent Pillsbury's attempted appeal, signed an order transmitting the original exhibits produced in evidence in the cause to the Circuit Court of Appeals (R. 243). No other document or order in

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set aside an award on the Monday following the thirtieth day when the thirtieth day falls on Sunday. Petitioner's contention that under such circumstances the proceeding may be filed on the Monday following was adopted by the District Court (see respondents' proposed findings III and IV [R. 197], which were refused), and was accepted by the Circuit Court of Appeals.

connection with the appeals was signed by the district or any judge within the three months' period provided by section 8(c) of the Act of February 13, 1925. No appeal was asked for or allowed in open court. The cost bond was approved on April 6, 1935, after the expiration of the three months' period (R. 245, 248). Petitioner moved to dismiss the appeals on the ground, *inter alia*, that no petition for allowance of an appeal was made to, and no appeal was allowed by, any judge or court authorized to allow appeals (R. 257). This motion was denied with opinion (R. 260-269). The court held that Admiralty Rule 1 (infra, p. 17) of the Circuit Court of Appeals for the Ninth Circuit is not inconsistent with section 8(c) of the Act of February 13, 1925, and that, under that Rule, an appeal "taken" simply by filing a notice of appeal in the office of the clerk may be entertained by the Circuit Court of Appeals.

Thereafter the decree of the District Court was reversed (R. 286). The court held (opinion R. 271-280) that the fact of employment was determined by the first compensation order of February 1, 1930, and became conclusive upon the expiration of the thirtieth day thereafter; that this jurisdictional fact was not open in a subsequent proceeding to set aside a second compensation award in the same case. Judge Wilbur, dissenting (R. 280-285), thought that the decision of the court was in conflict with *Crowell v. Benson*, 285 U.S. 22. He took the view that the Deputy Commissioner could not acquire jurisdiction and make a further and supplementary order of compensation merely by reason of an erroneous finding of a jurisdictional fact in the first instance; that such fact was open in any pro-

ceeding properly brought in the courts to obtain injunctive relief under section 21 of the Act. He was of opinion, however, that the Deputy Commissioner's order of October 16, 1931, refusing to set aside the order and award of September 16, 1931, was not a compensation order which could be reviewed under section 21 of the Act within thirty days of its entry. Accordingly, he concurred in reversal upon the ground that the compensation order of September 16th became final and conclusive, in the absence of the institution of court proceedings, upon the expiration of thirty days from the date of its filing, and that the proceeding herein, instituted November 16, 1931, was filed too late.

REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI.

A. REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE CIRCUIT COURT OF APPEALS DENYING THE MOTION TO DISMISS.

(1) *The decision of the Circuit Court of Appeals is in direct conflict with decisions of other Circuit Courts of Appeals on the same question.*

The decision sought to be reviewed is in direct conflict with decisions of the First, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals:

Baes v. People of Porto Rico (1st C.C.A.), 82 F. (2d) 317, 320-321;

Osborn v. United States (4th C.C.A.), 50 F. (2d) 712;

Ross v. White (6th C.C.A.), 32 F. (2d) 750; certiorari denied, 280 U.S. 584, No. 310, October Term, 1929;

United States v. New National Coal & Mining Co. (7th C.C.A.), 72 F. (2d) 168;

Robie v. Hart, Schaffner & Marx (8th C.C.A.), 40 F. (2d) 871;

Share v. United States (8th C.C.A.), 50 F. (2d) 669.

In *Ross v. White*, supra, appellants sought to perfect an appeal to the Circuit Court of Appeals for the Sixth Circuit by filing a notice of appeal with the clerk of the District Court. The appeal was not allowed in open court nor by order signed by the judge. The Circuit Court of Appeals dismissed the appeal, saying (pp. 751, 752):

> "The applicable section of the United States Code is title 28, §230 (28 USCA §230), being paragraph (c) of section 8 of the Act of February 13, 1925, • • •.
>
> This section superseded the portion of section 11 of the Act of March 3, 1891, c. 517, 26 Stat. 829, providing that no appeal or writ of error 'shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed'. This language, 'taken or sued out', or 'brought', as applied to a writ of error, and 'taken', as applied to an appeal, as provided in the earlier acts, has been the subject of judicial construction since early times.
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> • • • • • • •
>
> But unless some novel effect is to be given to the substitution of the words 'unless application therefor be duly made' for the former provision that no appeal or writ of error 'shall be taken or sued out', the repeated adjudications, of which the foregoing citations are but a partial list, would seem to be conclusive upon the doctrine that the appellate court does not acquire jurisdiction until the appeal is allowed, either

in open court at the same term, or until the petition for appeal, or its equivalent, is presented to either a Circuit or District Judge and acted upon by such judge, or until counsel has done all that could reasonably be required of counsel to accomplish such result * * *. The mere filing with the clerk of an application or notice of appeal, not presented to the judge, cannot be construed as an application 'duly made', within the language of 28 USCA §230, which in terms refers to an allowance. Such application, to be in due form, must be made to the judge and acted upon by him."

In *Robie v. Hart, Schaffner & Marx*, supra, the Circuit Court of Appeals for the Eighth Circuit considered the same question. The court pointed out that section 8(c) of the Act of February 13, 1925 (U.S.C., Title 28, §230), was controlling and held (p. 872):

"Appellee presents a motion to dismiss the appeal. The grounds of the motion are that no appeal was allowed in open court; that no petition for appeal was presented to a judge or acted upon by such within three months after entry of judgment.

* * * * * * *

The only thing done here within such three months' period was to file a 'Notice of Appeal'.

* * * * * * *

Obviously, this was not an 'application' for an appeal, either within the above section or otherwise. * * * This 'notice' was not intended to be an application or petition for an appeal, is not such in fact, and cannot be given that effect. The statute requires an 'application' for the appeal. While courts should be rather liberal in construing that word, yet they are not at liberty to disregard its reasonable meaning, which,

> in this usage, necessarily carries the element of request. * * * The requirements of this section are mandatory and jurisdictional, and not to be avoided by consent, waiver, or, even, order of court."

In *Share v. United States*, supra, the Circuit Court of Appeals for the Eighth Circuit again emphasized the same principles. In that case notice of appeal was served and filed within the three months period, but the petition for allowance of the appeal, with accompanying order, was not filed until after the expiration of that period. The court pointed out that the procedure followed did not comply with section 8(c) of the Act of February 13, 1925, which was controlling. After quoting that statute the court said (p. 670):

> "It is apparent from the record that no application for allowance of an appeal was made within the statutory period. * * * The notice of appeal was not effective for that purpose.
>
> The requirements of the statute above quoted are jurisdictional, * * *."

In *Osborn v. United States*, supra, the Circuit Court of Appeals for the Fourth Circuit likewise reached the same conclusion (pp. 713, 714):

> "But there is another defect fatal to the appeal. The record discloses that final judgment was entered in favor of the United States on August 8, 1930, and the petition for appeal was not presented to the trial judge, nor the appeal allowed, until November 26, 1930, more than three months after the entry of final judgment. The Act of Congress (U. S. Code, title 28, §230 [28 USCA §230] provides that no appeal shall be allowed unless application therefor be duly made

within three months after the entry of the judgment or decree. The requirements of this section are mandatory and jurisdictional and not to be avoided by consent, waiver, or acquiescence, or even by an order of the court.

* * * * * * *

Counsel contends also that the appeal should be considered because the appellant gave notice of an appeal.

* * * Aside from this, a notice of appeal is not sufficient. The Act of Congress * * * requires that an 'application' must be made for the appeal. While courts may be rather liberal in construing that word, yet they are not at liberty to disregard its reasonable meaning, which in this usage necessarily carries the element of request. * * *"

None of these decisions can be distinguished on the ground that it did not involve an appeal in admiralty. The statute makes no exception of such appeals.[5] It provides that *"No appeal* * * * shall be allowed unless application therefor be duly made * * *" (italics added). And the principles of the foregoing cases have been applied by the Circuit Court of Appeals for the Third Circuit to an appeal in admiralty.

The Ruth, 20 F. (2d) 314, 316.

The Rules of the Circuit Court of Appeals for the Second Circuit expresaly provide for the allowance of appeals in admiralty[6].

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5. Compare *Barrel v. Transportation Company*, 3 Wall. 424, where this Court dismissed an appeal in admiralty on the ground that a petition for an appeal filed with the clerk of the Circuit Court, unaccompanied by an allowance of the appeal by that court, was insufficient to bring up the case for review.

6. Rule 37: "1. An appeal in Admiralty to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of. *An allowance of the appeal shall be obtained and filed with the notice*" (italics added).

Nor can these cases be distinguished on the ground that the appeals in the present case were perfected pursuant to the requirements of Admiralty Rule 1 of the Circuit Court of Appeals for the Ninth Circuit, which is copied in the margin.[7] Each of the decisions is based expressly upon the provisions of section 8(c) of the Act of February 13, 1925; each emphasizes that the mandate of that statute is jurisdictional.

> "The requirements of this section are mandatory and jurisdictional, and not to be avoided by consent, waiver, or acquiescence, or even by an order of the court."
>
> *Osborn v. United States*, supra, p. 713;
>
> *Robie v. Hart, Schaffner & Marx*, supra, p. 872.

The Circuit Courts of Appeals possess only such appellate jurisdiction as is conferred by statute.

> *Realty Co. v. Montgomery*, 284 U.S. 547, 549.

And the rule-making power of those courts is by statute confined to the promulgation of "rules and regulations for the conduct of the business of the court *within its jurisdiction as conferred by law*" (italics added) (Judicial Code, §122; U.S.C., Title 28, §219).

This Court has emphasized that the rule-making power does not extend to enlarging or restricting the jurisdiction conferred by the laws of the United States.

> *Hudson v. Parker*, 156 U.S. 277, 284;
>
> *Meek v. Centre County Banking Co.*, 268 U.S. 426, 433-435.

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7. "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of."

See also:

Chisholm v. Gilmer, 299 U.S..... (decided Nov. 9, 1936);

In re Foster Const. Corporation (2d C.C.A.), 49 F. (2d) 213, 214.

(2) *The decision of the Circuit Court of Appeals is untenable on its face and should not be permitted to stand as a precedent.*

The ruling on the jurisdictional question in this case did not take the form of an unreported order but was accompanied by opinion which has been reported. This decision is untenable on its face, and should not be permitted to stand as a precedent. In its opinion the court said (78 F. (2d) 587, 590; R. 265, 267-268):

> "The purpose and, we think, the only purpose of section 8 (c) of the Act of February 13, 1925, was to shorten from six months to three months the time within which appeals might be taken to the Circuit Courts of Appeals.
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> This court was not unaware of the Act of February 13, 1925, when, on June 27, 1928, it revised its rules and readopted Admiralty Rule 1, as well as General Rule 11. The revision was made in the light of and in conformity with the act. Then, as now, this court saw nothing in the act to warrant the supposition that Congress intended thereby to abrogate Admiralty Rule 1 by abolishing appeals as a matter of right and making all appeals discretionary, thus rendering it impossible in any case to 'take' an appeal. We hold that Admiralty Rule 1 is still in effect, and that the appeals in this case were properly taken."

In so ruling the court entirely misconceived the nature and purpose of section 8(c) of the Act of February 13, 1925. That Act was not intended to, nor did it, abolish "appeals as a matter of right". Its purpose was to insure that an appeal should be accorded only in cases where the right thereto in fact exists. It established a procedure under which a judge should determine *in limine* whether an appeal lies in the particular case, thus avoiding delay and preserving the appellate dockets from cases appealed without statutory right. For example, a judge to whom application for allowance of an appeal is made should refuse to allow an appeal from a nonfinal decree where the statute provides for appeal only from final decrees.[8]

The adjudications of this Court with respect to its own jurisdiction and the practice obtaining thereunder (particularly the practice under Rule 12 of the Rules of this Court) clearly indicate the patent error into which the Circuit Court of Appeals fell in the present case. Since the enactment of the Judiciary Act of 1789 the federal statutes have provided for appeals as of right from certain decisions of the state courts. Nevertheless, it has always been a requirement that such appeals be applied for and allowed, and in the absence of allowance by the appropriate judge or justice of the state court, this Court is without jurisdiction.

Butler v. Gage, 138 U.S. 52, 55.

It would hardly be contended, however, that this requirement denies an appeal as of right in the cases specified in

8. It has also been held that a judge should refuse to allow an appeal where the appeal is utterly devoid of merit, in the view that an appeal "as a matter of right" does not lie unless there is at least "a semblance or possibility of merit" in the assignment of errors. *Wolf v. United States* (8th C.C.A.), 58 F. (2d) 220.

section 237(a) of the Judicial Code and makes "all appeals discretionary" (R. 268).

To take another example, section 266 of the Judicial Code provides a direct appeal from the decisions of district courts specially constituted of three judges in certain specified cases. Again, it would hardly be contended that the provisions of the statutes and the Rules of this Court requiring presentation of a petition for the allowance of an appeal in such cases, accompanied by a jurisdictional statement disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree, and requiring that an appeal in such cases be allowed, destroy the "appeal as a matter of right" provided by the Congress under section 266 of the Judicial Code. Indeed, this Court has pointed out that if a judge refuses to allow an appeal in a proper case mandamus will lie to compel him to allow the appeal to this Court.

Ex Parte Buder, 271 U.S. 461.

The history of the Act of January 31, 1928, abolishing the writ of error (45 Stat. 54), and the amendatory Act of April 26, 1928 (45 Stat. 466), familiar to this Court, corroborates the view adopted by every Circuit Court of Appeals which has had occasion to deal with the question except the Circuit Court of Appeals for the Ninth Circuit in the instant case.[9] At a recent hearing before the Senate Committee on the Judiciary, Mr. Justice Van Devanter, in referring to the act abolishing the writ of error and its

9. Prior decisions of the Circuit Court of Appeals for the Ninth Circuit are also in conflict with its decision in the instant case (*Von Holt v. Carter*, 86 F. (2d) 61; *McBee v. Palmer*, 73 F. (2d) 342), the court here having fallen into error in attempting to sustain the validity of Rule 1 of its Admiralty Rules, although its prior decisions, above cited, clearly point out that the limitation involved is statutory and therefore controlling.

amendment, had occasion to speak of the policy underlying the statutory requirement that appeals as of right shall be applied for and allowed.[10] The requirement was also emphasized by Mr. Justice Van Devanter at the hearing before the Judiciary Committee of the House of Representatives on the bill which later became the Act of February 13, 1925.[11]

Respondents may contend, as they did in the court below, that the action of the district judge in signing the order transmitting the original exhibits (R. 243) is the equivalent of an order allowing an appeal. This contention was not adopted by the Circuit Court of Appeals and does not appear on the face of the opinion. Moreover the point is without merit. It is true that it has been held that a formal order of allowance is unnecessary and that

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10. "I think there is not anything more that I wish to state, but I will say just this closing word. It is only indirectly apropos now. That is in reference to the laudable disposition about 12 years ago to simplify resort to our Court from State courts. There was an act passed—Senator Norris will recall it—that an appeal from a State court could be taken by just lodging a notice with the clerk of the supreme court of the State. That seemed simple on its face. It seemed as though it was in the interest of avoiding technicalities here and there. It had not been in force 10 days before there were appeals from convictions of murder in the State of Washington and two or three other States where there was not an iota of a Federal question. The Court was about to adjourn for the term. The appeals were holding up the whole matter of carrying the judgments into execution.

All of those cases, if presenting a Federal question, could have come to us by appeal or writ of certiorari, but not if devoid of such a question. Chief Justice Taft, Justice Brandeis, and I had an interview with Senator Norris and Senator Walsh. A bill was passed to eliminate the loose appeals, and, barring two or three appeals—I think four—no harm was done. Legislation along these lines should fit in with the existing legislation—with the existing system—and the principles upon which the existing legislation proceeds." Statement by Mr. Justice Van Devanter before the Senate Committee on the Judiciary at the hearing on S. 2176, March 25, 1925.

11. "In section 8 (c) the bill fixes three months as the period within which *application must be made* for a writ of error or appeal to take any case before a circuit court of appeals for review" (italics added). Hearing before the Judiciary Committee of the House of Representatives on H. R. 8206, December 18, 1924, p. 16.

signing the citation or taking and approving security for the appeal is the equivalent of the allowance of an appeal.

Sage v. Railroad Company, 96 U.S. 712, 714;
Brandies v. Cochrane, 105 U.S. 262;
Brown v. McConnell, 124 U.S. 489;
Stewart v. Masterson, 124 U.S. 493;
In re Alexander MacKenzie, 180 U.S. 536, 547.

But, in addition to the fact that these cases were decided under a different statute, the signing of a citation or approving an appeal bond constitutes an affirmative act intended as an allowance of appeal. In the instant case no equivalent act was taken. The order transmitting exhibits (R. 243) was not intended as the equivalent of the allowance of an appeal. It was simply an order made under the misapprehension that an appeal had already been perfected. The action of the district judge in this case is analogous to the action of the judge in attesting the certificate of the clerk authenticating the transcript of record in *Ross v. White* (supra), 32 F.(2d) 750, 752. As was held in that case, such an order, although made in pursuance of a supposed appeal, clearly is not the equivalent of the allowance of an appeal and is insufficient to constitute a compliance with the requirement of section 8(c) of the Act of February 13, 1925.[12]

12. It should be noted that, in any event, the order transmitting original exhibits was signed only in connection with respondent Pillsbury's attempted appeal.

(3) *The decision sought to be reviewed deals with an important question relating to the jurisdiction of the Circuit Court of Appeals; it therefore involves a subject matter appropriate to the exercise of the certiorari jurisdiction.*

Chisholm v. Gilmer, 299 U.S. ___ (decided Nov. 9, 1936);

Fox v. Capital Company, 299 U.S. ___ (decided Nov. 9, 1936).

B. REASONS RELIED ON FOR THE GRANTING OF A WRIT OF CERTIORARI TO REVIEW THE FINAL DECREE OF THE CIRCUIT COURT OF APPEALS.

(1) *The decision of the Circuit Court of Appeals is inconsistent with a prior controlling decision of this Court.*

Petitioner's contention in this respect is succinctly stated in the dissenting opinion of Judge Wilbur (R. 283-284):

> "My associates, as I understand, hold that the failure to seek a judicial review of the jurisdictional question within thirty days after the first award, foreclosed that question at the time of the second, additional and greater award. This is in accord with the view of the dissenting members of the Supreme Court, as expressed by Justice Brandeis in Crowell v. Benson, supra, but is, I believe, opposed to the views of the majority of the court as stated by Chief Justice Hughes. The Supreme Court held, in effect, that the finding of the Deputy Commissioner as to the fact of employment, had no effect, probative or otherwise, upon the trial of that question in court. The validity of the Deputy Commissioner's order the Supreme

Court held depended upon the existence of a contract of employment, and his decision upon that jurisdictional question was in no way binding upon the court which was required to determine that question upon evidence presented to it, by the parties. If the Deputy Commissioner were a court rather than an adminstrative officer, his finding of jurisdiction in the first proceeding would no doubt be conclusive upon the second and supplementary application for increased compensation due to the development of conditions not foreseen or compensated for in the first instance. But the jurisdiction of the administrative officer to take any action at all is dependent upon the fact of employment and this factual question is one which Congress had no power to take away from the court (Crowell v. Benson, supra). That the first order is effective and enforcible is conceded, because not attacked within thirty days. It does not follow that the second order, which the Deputy Commissioner had no authority or jurisdiction to make, is sustainable because the previous erroneous finding of jurisdiction was consented to by the Association, and because the order was complied with in the mistaken belief that the fact was, as found by the Deputy Commissioner. The Deputy Commissioner could not acquire jurisdiction to make a further and supplementary order of relief merely by reason of his erroneous finding of the jurisdictional fact in the first instance. The law under which he acted, expressly provided that the second award like the first, was subject to attack in the courts by an application for injunctive relief, 33 U.S.C.A., Sec. 921, Subd. b, and Sec. 922, wherein, the jurisdiction of the Deputy Commissioner to make the order is a sufficient reason for granting relief. (Crowell v. Benson, supra.)"

It is submitted that these views are sound. Under the provisions of section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (supra, p. 5) petitioner had the right to attack in the courts, through injunction proceedings, any "compensation order" not in accordance with law. No one disputes that the second order in this case, awarding compensation for permanent disability, was a "compensation order" within the meaning of section 21(b). It inevitably follows, from the terms of the statute as construed in *Crowell v. Benson*, supra, p. 62, that that order was subject to attack on the ground that the Deputy Commissioner was without jurisdiction. The court below did not disturb the finding by the District Court that at the time of the injury Weidemann was not an employee of petitioner, but put its decision upon the ground that the contrary finding on this jurisdictional fact made by the Deputy Commissioner at the first hearing was binding upon petitioner in respect of every subsequent order in the case. This conclusion was largely founded upon the court's view that under section 22 of the Act (supra, p. 6), as it read prior to the amendment of May 26, 1934 (supra, p. 6), the Deputy Commissioner was without power to reopen the case except upon a showing of a change in the employee's physical condition. It is submitted that this interpretation fails to express the intent of Congress, and that the amendment of May 26, 1934, expressly giving the Deputy Commissioner the right to review a compensation order on the ground "of a mistake in a determination of fact," was declaratory of the true meaning of the section as originally enacted.

See:

Wetmore v. Markoe, 196 U.S. 68, 76-77.

But, in any event, the power possessed by the Deputy Commissioner under the statute either before or after its amendment has no bearing upon petitioner's right to a trial *de novo* of the jurisdictional fact of employment. The statute both before and since its amendment conferred a clear right to a judicial review of any compensation order, and on such review the jurisdictional fact of employment was open for consideration by the court (*Crowell v. Benson*, supra).

(2) *The decision of the Circuit Court of Appeals involves an important question of federal law which has not been, but should be, settled by this Court.*

The District Court held that the order of the Deputy Commissioner overruling the petition to set aside his order of September 16, 1931, was a reviewable order under section 21(b) of the Act. The Circuit Court of Appeals did not disturb this conclusion. Judge Wilbur, however, took a different view, and the question is necessarily involved.

It is submitted that the decision of the District Court is correct and that the proper procedure to be followed under the Act, where mistake of fact is discovered within thirty days of the entry of an order by the Deputy Commissioner, is to bring the new facts to the attention of the Deputy Commissioner within the thirty days preceding finality (section 21(a), supra, p. 6), and give him an opportunity to rule upon them prior to resort to the courts. Under such a procedure the general purposes and intent of the statute are subserved. The provisions of the Act indicate a clear intention that all facts regarding a claim shall be determined in the first instance by the Deputy

Commissioner. As pointed out by this Court in *Crowell v. Benson*, supra, p. 43, the Act provides "that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim." The courts should not be burdened with petitions to suspend or set aside orders of the Deputy Commissioner in cases where such orders may be corrected by the Deputy Commissioner himself upon a proper factual showing. In addition it constitutes an unwarranted curtailment of the administrative functions of the Deputy Commissioner to require recourse to the courts to set aside a compensation order where the facts upon which relief is based are newly discovered and as a result have not been called to the attention of the Deputy Commissioner. Under such circumstances the appropriate procedure is the one followed in the instant case, namely, to bring the newly discovered facts to the attention of the Deputy Commissioner before his order becomes final, obtain his ruling thereon, and within thirty days seek a review of his order if it is deemed to be not in accordance with law.

The question thus presented is novel and important.[13]

(3) *The decision of the Circuit Court of Appeals construes the provisions of an important federal statute, national in scope, and involves a subject matter heretofore deemed by this Court worthy of review under the certiorari jurisdiction.*

Del Vecchio v. Bowers, 296 U.S. 280, 285.

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13. See the 19th Annual Report of the United States Employees' Compensation Commission. Table 18, p. 52, indicates that 26,188 non-fatal, and 144 fatal injuries were reported by employers for the fiscal year 1934-1935.

CONCLUSION.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, and that the decree of the Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Dated, San Francisco, California,
December 2, 1936.

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